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PERBADANAN PENGURUSAN ARA AMPANG v. PENTADBIR TANAH DAERAH HULU LANGAT

HIGH COURT MALAYA, SHAH ALAM
TEE GEOK HOCK JC
[LAND REFERENCE NO: BA-15-210-10-2019]
24 MARCH 2021

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LAND LAW: *Acquisition – Compensation – Land reference – Acquisition authority compensated parcels owners of strata units for market values of respective strata units – Whether acquisition authority can acquire common property in same strata development in same acquisition process – Whether acquisition authority required to pay any value to management corporation of strata development – Strata Titles Act 1985, s. 57 – Land Acquisition Act 1960*

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In this land reference, the question of law that arose was whether, after having compensated the parcel owners of strata units for the market values of their respective strata units, the acquisition authority could acquire the common property in the same strata development in the same acquisition process without paying any value to the management corporation of the strata development. The respondent ('Land Administrator') took the position that the management corporation should not get any monetary compensation whatsoever for the common property. The ancillary arguments of the Land Administrator was that (i) the common property held by the management corporation was non-transferable by law and therefore, there was no value attached to such non-transferable common property; (ii) the value of the common property has been included in the compensations paid by the acquisition authority to the parcel owners for their respective parcel units in the strata development; and (iii) the management corporation did not collect parking fees for the majority of the car parking bays within the strata development. The opinion of the Government assessor was that after having paid the compensation to the parcel owners of the strata titles in a stratified development to the management corporation, no compensation whatsoever ought to be paid for the compulsory acquisition of the common property in the stratified development to the management corporation, the proprietor of the common property. The reasons for the Government assessor's opinion were (i) the compensations to the parcel owners for the acquisition to the strata parcels included the common value of the common property and any compensation payable to the management corporation for the acquisition of the common property would be double counting; (ii) the management corporation is not an entity established for the purpose of business operations or for profit and any income derived from the common property could not be regarded as earnings to be enjoyed by enterprise or investor; and (iii) the collection of incomes from the common property have to be deposited in a maintenance account pursuant to statute and be used for the maintenance of the building and therefore, could not be regarded as profit to be enjoyed by

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enterprise or investor. The appellant, on the other hand, took the position that it was entitled to a reasonable compensation to the common property in strata development which had been acquired in the same process as the acquisition of the strata units in the same development. The private assessor was of the opinion that no compensation should be paid for part of the common property in the form of basement car parking bays and open air car parking bays. The private assessor's reasons regarding common property in the form of the vacant land was that the vacant land had been used as access road and working space to service the stratified development and any compensations and therefore, over and in addition to the compensations paid to the parcel owners for any re-development potential in the far distant future, would be double counting.

Held (management corporation entitled to be paid reasonable compensation for compulsory acquisition of common property):

(1) It was not correct to say that the common property was perpetually non-transferable. Based on s. 57 of the Strata Titles Act 1985, the common property in the form of land in the open space for parking bays and other common facilities is transferable in the event of cancellation of subdivision upon the total destruction of the strata building and could then be sold or transferred to another legal entity for valuable and substantial consideration. Even in the case of perpetually non-transferable property, such as a building held by charitable trust for perpetuity, the fact that it is non-transferable for perpetuity does not make it valueless and does not empower an acquisition authority to compulsorily acquire it without any compensation. The Land Administrator's proposition in the scenario of compulsory acquisition of charitable properties held in perpetuity would be contrary to the protection of property rights enshrined in art. 13 of the Federal Constitution. While it was legitimate to say that a charitable property held for perpetuity, being non-transferable by nature, has a comparatively lower market value than its neighbouring properties of the same category of land use in the same locality, it was erroneous to say it had no market value at all. (para 22)

(2) There was no cogent proof of the factual assertion by the Land Administrator that the value of the common property had been included in the compensations paid by the acquisition authority to the parcel owners for their respective parcel units in the strata development. Even if he was factually correct, it would not absolve the acquisition authority from its legal responsibility to pay reasonable compensation for the common property of its rightful proprietor, the management corporation. (para 23)

(3) Under Malaysian laws, there is no statutory prohibition against a management corporation's levy and collection of parking fees in the car parking bays which form part of the common property in the strata development. The Land Administrator's argument on this point was contrary to decided authority on common property, unsustainable and invalid. (para 24)

(4) After having compensated the parcel owners of strata units for the market values of their respective strata units, the acquisition authority could not acquire the common property in the same strata development in the same process without paying any value to the management corporation of the strata development irrespective of the facts and circumstances of the strata development. The acquisition authority still has to pay a reasonable compensation to the management corporation of the strata development for having acquired the common property in the same strata development in the same acquisition process, provided that the valuation of such compensation amount shall be done in accordance with the provisions of sub-para. 1(2C) of the First Schedule to the Land Acquisition Act 1960. (paras 30 & 31)

(5) In the context of the present land reference, no additional compensation should be made to the management corporation for the vacant land or open space which formed the common property but some reasonable compensation ought to be paid to the management corporation for the car parking bays. The vacant and open space which formed parts of the common property were devoted solely and exclusively to serve the use and enjoyment of parcel owners and occupiers of the strata parcels and apart from such purposes there was no other conceivable purpose and also no income to be derived from them. As such, after having compensated the parcel owners for the acquisition of strata parcels which compensation included the parcels owners' rights of use and enjoyment of the vacant land and open space within the stratified development, it would be double counting for the management corporation to be compensated again for the vacant land and open space within the stratified development. Seventeen numbers of the car parking bays have been earning incomes for the management corporation before and at the time of the compulsory acquisition. If not for such acquisition, the management corporation would have continued to earn an income from these 17 car parking bays. As regards the balance 105 car parking bays which were for the time being allowed by the management corporation to be used by the parcel owners and the occupiers free of charge, there is no legal prohibition against the management corporation from deciding to impose parking charges at some future time and thereby earning income from them. This potential income-earning capacity or opportunity had been eliminated by the compulsory acquisition. (para 32)

(6) The corridors, verandas, lift lobbies, staircases and walkways which formed parts of the common property within the stratified building structure but are outside the strata parcels of the parcel owners are so integrated with the building structure and so closely connected with the use and enjoyment of the strata parcels that no separate or additional value ought to be paid to the management corporation after the parcel owners have been compensated for the compulsory acquisition of their strata parcels. There was also no possibility of the management corporation's potential for collection or earning any rental or income from these types of common property. As such, no compensation value should be given for these types of common property. (para 36)

(7) The Land Administrator's award for the management corporation shall be increased by an amount of RM685,040 with interest thereon at 5% per annum from the date of Borang K until the date of full realisation. (para 44)

Case(s) referred to:

Alagappa Chettiar v. Collector Of Land Revenue, Kuala Lumpur [1968] 1 LNS 4 FC ***(refd)***
Caruana v. Port Macquarie-Hastings Council [2007] NSWLEC 109 ***(refd)***
Cold Storage Singapore [1983] Pte Ltd v. The Management Corp Of Chancery Court & Ors [1992] 1 CLJ 537; [1992] 4 CLJ (Rep) 272 CA ***(refd)***
Dr Christian Jurgen Kaul & Anor v. Meru Valley Resort Bhd [2013] 6 CLJ 597 HC ***(refd)***
E & O Trading Sdn Bhd v. Americk Singh Sidhu & Ors And Another Appeal [2018] 7 CLJ 685 CA ***(refd)***
Guan Soon Tin Mining Co v. Ampang Estate Ltd [1972] 1 LNS 39 FC ***(refd)***
Lionel Yew Wei Ming & Anor v. Menara Duta Management Corporation [2018] 1 LNS 2294 HC ***(refd)***
Malaysia Land Properties Sdn Bhd v. Waldorf & Windsor Joint Management Body [2014] 6 CLJ 821 CA ***(refd)***
Nusantara Daya Sdn Bhd v. Pentadbir Tanah Johor Bahru [2020] 1 LNS 95 CA ***(refd)***
Park Access Sdn Bhd & Ors v. Badan Pengurusan Bersama Prima Avenue Dan DPCC Fasa 1 (Blok G, H, I) & Other Appeals [2018] 1 LNS 711 CA ***(refd)***
Perbadanan Kemajuan Pertanian Selangor v. JW Properties Sdn Bhd [2017] 8 CLJ 392 FC ***(refd)***
Rethnasamy v. Teoh Ngoo Mooi & Anor [1982] 1 LNS 82 HC ***(refd)***
Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***

Legislation referred to:

Federal Constitution, art. 13
Land Acquisition Act 1960, First Schedule para 1(1A), (2B), (2C)
Strata Management Act 2013, s. 20
Strata Titles Act 1985, ss. 39(3), 42(1), 57

For the applicant - HY Lee; M/s HY Lee & Co
For the respondent - Etty Eliany Tesno; State Legal Advisor, Selangor

Reported by Lina E

JUDGMENT

Tee Geok Hock JC:

Introduction

[1] This land reference involves a very important question of law of wide implications to property owners and management corporations of strata developments in Malaysia.

[2] The question of law is whether, after having compensated the parcel owners of strata units for the market values of their respective strata units, the acquisition authority can acquire the common property in the same strata development in the same acquisition process without paying any value to the management corporation of the strata development.

[3] In our present land reference, the Land Administrator has taken the position that the management corporation in such land acquisition scenario should not get any monetary compensation whatsoever for the common property in the strata development, whereas the appellant (management corporation) has taken the position that it is entitled to a reasonable compensation for the common property in the strata development which has been acquired in the same process as the acquisition of the strata units in the same development.

[4] When this matter first came up for hearing and decision previously, this court directed the parties to do further legal research and file and exchange supplementary submissions on this important question of law which, according to the understanding of this court based on both counsel's feedback, has still not been covered by any reported judgment of the court in Malaysia on this question of law.

Background

[5] A brief summary of the subject land and the land acquisition are as follows:

Subject Land:

Title No. GM472 Lot 43171 Seksyen 14 Bandar Ampang Daerah Hulu Langat, Selangor.

Gazette No./Date :	2081/23 July 2015
Date of service of Borang E :	21 August 2015
Date/Area (Borang G) :	18.10.2016/3895 M^2 (41,926 sq ft)
Date/Area (Borang H) :	18.10.2016/3895 M^2 (41,926 sq ft)
Project :	Projek Lebuhraya Bertingkat Sungai Besi-Ulu Kelang (SUKE) Daerah Ulu Langat, Negeri Selangor.

Area of Subject Lot :	3895 M^2 (41,926 sq ft)
Area of the acquired land :	3895 ^{M2} (41,926 sq ft)
Category of land use :	Building
Status/tenure :	freehold

Compensation awarded by Land Administrator for the Common Property:

Land :	Nil.
Building :	Nil.
Others :	46,190.00 (disturbance of business & building maintenance)

Question Of Law

[6] Firstly, it is clear law that a management corporation, upon its incorporation, is a legal entity separated from the parcel owners in the strata development: see s. 39(3) of the Strata Titles Act 1985 and s. 20 of the Strata Management Act 2013, *Lionel Yew Wei Ming & Anor v. Menara Duta Management Corporation* [2018] 1 LNS 2294 (Su Geok Yiam J).

[7] Secondly, the common property is not part of a parcel or accessory parcel which is owned by an individual unit owner in the strata development, as is self-evident in the statutory definition of "common property" set out below and also the judgment of Idrus Harun JCA (later FCJ) in *E & O Trading Sdn Bhd v. Americk Singh Sidhu & Ors And Another Appeal* [2018] 7 CLJ 685 at para [21]:

(i) section 4 of the Strata Titles Act 1985

"common property" means **so much of the lot as is not comprised in any parcel** (including any accessory parcel), or any provisional block as shown in a certified strata plan;

(ii) section 2 of the Strata Management Act 2013

common property:

(a) in relation to a building or land intended for subdivision into parcels, means so much of the development area:

(i) as is not comprised in any parcel or proposed parcel; and

(ii) used or capable of being used or enjoyed by occupiers of two or more parcels or proposed parcels; or

(b) in relation to a subdivided building or land, means **so much of the lot**:

(i) **as is not comprised in any parcel**, including any accessory parcel, or any provisional block as shown in a certified strata plan; and

(ii) **used or capable of being used or enjoyed by occupiers of two or more parcels**; (emphasis added)

[8] In the third place, it is clear law that the management corporation upon its coming into existence is the proprietor of all common property in the strata development: see s. 42(1) of the Strata Titles Act, s. 17(3) of the Strata Titles (Amendment) Act 2013 (Act A1450) Court of Appeal's decision in *Malaysia Land Properties Sdn Bhd v. Waldorf & Windsor Joint Management Body* [2014] 6 CLJ 821 (Mah Weng Kwai JCA), *Park Access Sdn Bhd & Ors v. Badan Pengurusan Bersama Prima Avenue Dan DPCC Fasa 1 (Blok G, H, I) & Other Appeals* [2018] 1 LNS 711 para [28].

[9] It has been judicially recognised that strata development with common property can be in high-rise property development projects as well as resort-style guarded and gated development projects with bungalows, semidetached houses, terraced houses which can be single-storey or double-storey buildings with each building owned by a separate owner: see the judgment of Lee Swee Seng J (now JCA) in *Dr Christian Jurgen Kaul & Anor v. Meru Valley Resort Bhd* [2013] 6 CLJ 597. This, according to the assessors in our present case, reflects the reality of the property industry and the strata development projects approved by various governmental authorities in Malaysia.

[10] Learned counsel for the appellant has cited a case decided by the New South Wales court in *Caruana v. Port Macquarie-Hastings Council* [2007] NSWLEC 109 where the facts are materially similar to those of the present case. In *Caruna* case the third applicant, ie, Owners of Strata Plan 12292, was the owner of the common property on a strata development land (namely, double-storey shop known as Ritze Arcade, Clarence Street, Port Macquarie) which was compulsorily acquired by the Government. The third applicant claimed for two components of compensation in respect of the common property, ie, compensation for potential lease of common property and pre-acquisition legal and valuation fees. The court held that:

> 74 Mr Longa allowed nothing for the value of these areas of the common property. He made the following points. First, he considered that the value of the common property was inherent in the value of the lots within the strata plan. Consequently; if the amounts for which Mr Allsopp contended had a proper basis, then he (Mr Longa) would allocate them to the owners of the individual lots rather than to the owner of the common property. *I disagree. In my view it is the owner of the common property that would derive income from any such use of the common property and, therefore, any value attributable to that potentiality should be ascribed to the owner of the common property*

The court allowed the third applicant's appeal on potential lease of common property:

> 79 I accept that there was some potential to use the common areas in the three ways proposed; that that potential was not explored by the strata manager since it took over in 2003 because it was aware that the respondent would be acquiring and demolishing the building; and that there are precedents for such uses. However; the factors discussed above

which weigh against the realisation of the potential or which bear on the vacancy rate are so weighty that I cannot accept the values which Mr Allsopp ascribed. The respondent did not suggest any method of assessment other than the vacancy rate method proposed by Mr Allsopp, if I were minded to award a sum for this claim. Consequently, I am prepared to adopt that method and to assume Mr Allsopp's total starting point of $8,700. *In light of all the adverse factors to which I have referred, I will adopt a vacancy rate of 90 percent, capitalised at 10 percent Accordingly, I assess this claim at $8,700.*

[11] In Malaysia, s. 57 of our Strata Titles Act 1985 (as amended by Act A1518) provides as follows:

57 Termination of subdivision

(1) The management corporation, where:

(a) the building is totally destroyed; or

(b) the parcel proprietors seek to demolish the building or, in the case of a building which has been partially destroyed, the remaining parts of the building; or

(c) there is only one proprietor for all the parcels,

after making sure that no land revenue is outstanding may be directed by unanimous resolution to take action to terminate the subdivision of the building or land; and, subject to any order of a court of competent jurisdiction made under sub-s. (7), the management corporation if so directed shall lodge with the Registrar a notification in Form 8 together with the issue documents of title of the land and the parcels and of provisional blocks, if any

(2) On receipt of a notification under sub-s. (1) and if the Registrar is satisfied, he shall make a memorial of the notification in the register and the strata register, and shall inform the Director of Survey that he has done so.

(3) On the making of a memorial under sub-s. (2) in respect of a subdivided building or land:

(a) the subdivision shall be terminated and the proprietors shall cease to be proprietors of the parcels and provisional blocks; and

(b) the management corporation shall become the proprietor of the lot as the trustee of the former proprietors.

(4) Where the management corporation becomes the proprietor of the lot under sub-s. (3):

(a) any registered charge on a parcel which existed immediately before the termination of the subdivision shall be converted into a personal obligation of the chargor to pay to the chargee what is due under the charge;

A (b) each of the former proprietors shall continue to be a member of the corporation, having the same voting rights as he had immediately before the termination of the subdivision;

(c) the management corporation shall hold and manage the lot for the benefit of the former proprietors;

B (d) the former proprietors may by unanimous resolution direct the management corporation:

(i) to transfer the lot to any one or more of the former proprietors or to any other person or body; and

C (ii) to determine the reasonable period for the management corporation to continue in existence to settle its affairs;

(e) the management corporation shall distribute any profits arising from its proprietorship of the lot, including any purchase money received on a transfer, to the former proprietors proportionately based on the open market capital values of the parcels D immediately before the termination of the subdivision ascertained in a valuation report prepared and certified by a registered valuer under the Valuers, Appraisers and Estate Agents Act 1981 [Act 242].

(5) Notwithstanding the termination of a subdivision under this E section, the relevant book of the strata register shall continue in existence while the management corporation remains the proprietor of the lot and may be used in evidence as a record of matters relating to the subdivision before its termination.

(6) Where the management corporation, having become the proprietor F of the lot under sub-s. (3), transfers the lot in pursuance of a direction under paragraph (4)(d):

(a) the management corporation shall continue in existence for so long as it is reasonably necessary to settle its affairs and shall then cease to exist;

G (aa) informing the Registrar the date that the management corporation shall cease to exist; and

(b) the Registrar shall cancel the relevant book of the strata register.

(7) A court of competent jurisdiction, if it is satisfied that the justice of the case so requires:

H (a) may on the application of the management corporation, a parcel proprietor or the registered chargee of a parcel make an order:

(i) directing the management corporation to take action under sub-s. (1) notwithstanding the absence of a unanimous resolution; or

I (ii) prohibiting the management corporation from taking action under that subsection notwithstanding a direction given by unanimous resolution; and

(b) where the management corporation has transferred the lot in pursuance of a direction under paragraph (4)(d), may on the application of the management corporation, a former proprietor or a former chargee make an order for the winding up of the affairs of the management corporation.

(8) In this section:

"former chargee" means a person who, or a body which, immediately before the subdivision of a subdivided building or land is terminated under this section, is the registered chargee of a parcel in the building or land;

"former proprietor" means a person who, or a body which, immediately before the subdivision of a subdivided building or land is terminated under this section, is the proprietor of a parcel in the building or land or of a provisional block on the land on which the building is situated.

[12] Section 57 of the Strata Titles Act recognises, among others, the following legal positions:

(i) where a strata building is totally destroyed, there is no longer any strata parcel in existence and therefore the entire land upon which the building previously stood will belong to the management corporation;

(ii) the management corporation can, with the resultant cancellation of subdivision, sell or transfer the said land for a fair market value; and

(iii) the sale proceeds, after deduction of expenses of and ancillary to the sale, shall be distributed to the former proprietors in proportion to their parcels' values immediately before the date of destruction of the building.

This is statutory recognition that the management corporation can obtain sale proceeds from the property in respect of which the management corporation is the proprietor, and thereafter distribute any unutilised surplus proceeds to the previous parcel owners. Implicit in s. 57 read in light of the law of property is that as a proprietor, the management corporation is entitled to a reasonable value for the property (including common property) owned by it in the event of a sale or acquisition by another legal entity.

Analysis Of The Parties' Respective Positions

[13] We now come to the analysis of the positions taken by the parties in our present case, namely the Land Administrator has taken the position that the management corporation in such land acquisition scenario should not get any monetary compensation whatsoever for the common property in the strata development, whereas the appellant (management corporation) has taken the position that it is entitled to a reasonable compensation for the common property in the strata development which has been acquired in the same process as the acquisition of the strata units in the same development.

[14] In verifying and assessing the validity and sustainability of a proposition of law, it is often difficult to see the logic or rationality or otherwise of a legal proposition by viewing them in light of borderline factual situations. A better and more accurate verification and assessment exercise can be readily undertaken if we were to apply the legal proposition to both far ends of the factual spectrum so that we can clearly see the logic or rationality or otherwise of the legal proposition. This is what this court will attempt to do now.

[15] Taking the proposition of the Land Administrator first, namely, the proposition that after having compensated the parcel owners of strata units for the market values of their respective strata units, the acquisition authority can compulsorily acquire the common property in the same strata development in the same process of acquisition without paying any value to the management corporation of the strata development. We all know that many high-rise buildings are built to last for a few decades and that when a strata high-rise building is very old, say almost 100 years of age, it is probably condemned as unsafe for human habitation and the market values of the strata parcel units in such old and condemned strata building is very minimal. The management corporation of this old strata development is the proprietor of all common property including the land upon which the building has been erected. Suppose the acquisition authority compulsorily acquires the entirety of this old strata development, then by the Land Administrator's argument here, the acquisition authority would only have to compensate the parcel owners their market values of strata parcels (which are nominal due to very old age and in unsafe condition) but does not have to pay any money to the management corporation for the acquisition of the common property (including the land) irrespective of the fact that this land might be located within the central business district of the capital city. This court finds that in such scenario, this proposition of the Land Administrator is irrational and illogical. Moreover, this court finds that such proposition of the Land Administrator is also inconsistent with the principles of fair market value compensation decided by our appellate courts in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561 (Federal Court) and *Nusantara Daya Sdn Bhd v. Pentadbir Tanah Johor Bahru* [2020] 1 LNS 95 (Court of Appeal). In *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Ors* the Federal Court held as follows regarding the principle of equivalence:

> Adequate Compensation
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> [197] Article 13(2) is a constitutional safeguard to land owners to receive "adequate compensation" upon acquisition. Even as the Act authorises the State to acquire land from landowners, the law provides that the person deprived of his property must be adequately compensated.

> [198] But what is adequate compensation for a person who has been deprived of his or her property? The term "adequate compensation" is not defined in the Act. In *Pentadbir Tanah Daerah Gombak v. Huat Heng (Urn Low & Sons) Sdn Bhd* [1991] 1 CLJ 16; [1991] 1 CLJ (Rep) 356; [1990] 3 MLJ 282, the Supreme Court held that "the basic principle governing compensation is that **the sum awarded should, as far as practicable, place the person in the same financial position as he would have been in had there been no question of his land being compulsorily acquired**", (see "*Compulsory Acquisition and Compensation"* by Sir Frederick Corfield QC and RJA Carnwath).
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> [199] The above principle is known as the **principle of equivalence**. By this principle, the affected landowners and occupants are entitled to be compensated fairly for their loss. But they should receive compensation that is no more or no less than the loss resulting from the compulsory acquisition of their land. (emphasis added)

In *Nusantara Daya Sdn Bhd v. Pentadbir Tanah Johor Bahru*, the Court of Appeal follows regarding development potential:

> In proceedings relating to the determining compensation under the LAA 1960, art. 13 of the Federal Constitution on the fundamental right to property enjoins that there be adequate compensation for the deprivation of property through compulsory acquisition. In this instance, the learned judge did not appear to have fulfilled the requirement to consider the development potential of the scheduled land. Given the established facts, it was incumbent upon the learned judge to have recognised the scheduled land's development potential and to have made provision accordingly. The non-consideration is a misdirection in law which can be corrected on appeal. Having considered the totality of the evidence on the record, we are of the view that an upward adjustment of 25% shall be allowed for potentialities development of the scheduled land. In coming to our decision, we have considered the various authorities cited by counsel for the appellant, which authorities reiterate trite and settled principles of law relating to this issue.

In the above example of the very old and condemned strata building, a buyer who intends to purchase the said property is primarily looking at the land and its strategic location with re-development potentials and would offer its prevailing market price for its purchase. However, a compensation approach for a very old and condemned strata building according to the Land Administrator's proposition would be giving value only to the condemned units and give a minimal value to each of the strata parcels but no value whatsoever for the land (being part of the common property). The proposition of the Land Administrator in such situation is the very opposite of what a willing buyer and willing seller would consider and bargain in the sale and purchase of this type of transaction. A willing buyer of a very old and condemned strata building is prepared to pay a substantial value for the land due to its prime or strategic location for re-development but not

substantial values of the individual strata units which are condemned as unsafe for occupation. Worse, the Land Administrator's proposition would result in a gross under-valuation of the price or price to be paid for this property, in the considered opinion of this court, by analysing it this way and to this extent, the Land Administrator's proposition is incorrect in logic and unsustainable under the laws.

[16] Lest some might think that the illogical and irrational result only comes into play in a situation of very old and condemned strata building, let us now analyse the same proposition in light of a new strata development.

[17] As is judicially recognised and a factual reality now, strata development and common property nowadays also apply to resort-style guarded and gated development projects with bungalows, semi-detached houses, terraced houses which can be single-storey or double-storey buildings with each building owned by a separate owner: see para. 3 above. Take the example of a new luxurious strata development as a resort-style bungalow in a guarded and gated community where the bungalow owners also enjoy plenty of open space and greeneries including a sizeable park and a 9-hole golf course of many acres within the same strata development and where all the open spaces are held by the management corporation as the proprietor. Supposed that shortly after the completion of the strata development and shortly after the coming into existence of the management corporation, an acquisition authority compulsorily acquires the 9-hole golf course in the strata development, and then another equally influential acquiring authority also joins in the game by compulsorily acquiring the park area from the strata development. By the Land Administrator's proposition, to and behold – no compensation is payable to the management corporation because these lands are parts of the common property; neither do the parcel owners have any legal recourse for they are separate legal entities and they were not the proprietors of the park area or the golf course lands. Viewed in light of a new strata development in such scenario, this court finds that in such scenario this proposition of the Land Administrator is also irrational and illogical. Moreover, this court finds that such proposition of the Land Administrator is also inconsistent with the principles of fair market value compensation decided by our appellate courts in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Ors* [2017] 5 CLJ 526; [2017] 3 MLJ 561 (Federal Court) and *Nusantara Jaya Daya Sdn Bhd v. Pentadbir Tanah Johor Bahru* [2020] 1 LNS 95 (Court of Appeal): see para. 15 above.

[18] Next, we come to the analysis of the appellant's proposition, namely, the management is entitled to a reasonable compensation for the common property in the strata development which has been acquired in the same process as the acquisition of the strata units in the same development. To promote equality before law, we shall analyse the management corporation's proposition in light of the same scenarios as those applied to the Land Administrator's proposition in the abovementioned paragraphs.

[19] In the scenario of the very old high-rise building (say 100 years old) which is probably condemned as unsafe for human habitation, suppose the acquisition authority compulsorily acquires the entirety of this old strata development, then by the appellant's argument here, the acquisition authority would have to compensate the parcel owners their market values (which are relatively small values due to their very old age and unsafe condition) and also pay a reasonable compensation to the management corporation for the acquisition of the common property (including the land). In the above example of the very old and condemned strata building, a buyer who intends to purchase the said property is primarily looking at the land and its location with re-development potentials and would offer its prevailing market price for its purchase. Similarly, a compensation approach according to the appellant's proposition would be giving value to the parcel owners of the condemned strata units (if their market values are relatively small, they should get compensation according to such small market values) and a fair and reasonable value for the land with re-development potentials (being part of the common property) to its proprietor, the management corporation, and thereafter it is up to the management corporation to distribute the net proceeds, after deduction of sale expenses and after set-off with the accounts payable of each parcel owner, to the parcel owners in proportion to their parcel market values immediately prior to the acquisition. The proposition of the management corporation in such situation is the same as what a willing buyer and willing seller would consider and bargain in the sale and purchase of this type of transaction, namely attributing more value to the land than to the old and condemned strata units. When properly assessed and evaluated, the management corporation's proposition would not result in any gross under-valuation or over-valuation of the market price to be paid for this property. In the considered opinion of this court, by analysing it this way and to this extent, the management corporation's proposition is correct in logics and also consistent with the principles of compensation decided by our appellate courts in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561 (Federal Court) and *Nusantara Jaya Daya Sdn Bhd v. Pentadbir Tanah Johor Bahru* [2020] 1 LNS 95 (Court of Appeal): see para. 15 above.

[20] Next, we take the example of a new luxurious strata development as a resort-style bungalow in a guard and gated community where the bungalow owners also enjoy plenty of open space and greeneries including a sizeable park and a 9-hole golf course within the same strata development and where all the open spaces are held by the management corporation as the proprietor. Supposed that shortly after the completion of the strata development and shortly after the coming into existence of the management corporation, an acquisition authority compulsorily acquires the 9-hole golf course in the strata development, and then another equally influential acquiring authority also join in the game by compulsorily acquiring the park area from the strata

development. By the management corporation's proposition, reasonable compensation is payable to the management corporation because these lands are parts of the common property. Viewed in light of a new strata development in such scenario, this court finds that in such scenario, this proposition of the management corporation is rational and logical. Moreover, this court finds that such proposition of the management corporation is in consonance with the principles of fair market value compensation decided by our appellate courts in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561 (Federal Court) and *Nusantara Jaya Daya Sdn Bhd v. Pentadbir Tanah Johor Bahru* [2020] 1 LNS 95 (Court of Appeal): see para. 15 above.

[21] Our next exercise is to examine the other ancillary arguments of the Land Administrator in our present case.

[22] One of the ancillary arguments of the Land Administrator is that the common property held by the management corporation is non-transferable by law and therefore it is argued that there is no value to be attached to such non-transferable common property. In the first place, it is not correct to say that the common property is perpetually non-transferable. As can be seen from the provisions of s. 57 of the Strata Titles Act, the common property in the form of land in the open space for parking bays and other common facilities are transferable in the event of the cancellation of subdivision upon the total destruction of the strata building and can then be sold or transferred to another legal entity for valuable and substantial consideration. Even in the case of perpetually non-transferable property such as a building held by charitable trust for perpetuity (for example, religious buildings or other charity premises held in charitable trust in perpetuity), the fact that it is non-transferable for perpetuity does not make it valueless and does not empower an acquisition authority to compulsorily acquire it without any compensation. The Land Administrator's proposition in the scenario of compulsory acquisition of charitable properties held in perpetuity would be contrary to protection of property rights enshrined in art. 13 of our Federal Constitution. While it is legitimate to say that a charitable property held for perpetuity, being non-transferable by nature, has a comparatively lower market value than its neighbouring properties of the same category of land use in the same locality, it is erroneous to say it has no market value at all. As far as this court can discern, the common property of the strata development is not placed under a perpetual non-transferable but merely a temporary non-transferability for a lengthy duration of time (until the strata building is totally destroyed and the subdivision cancelled) or a contingent transferability (when all the parcel owners vote for cancellation of subdivision and for the outright sale of the entire strata development to a seller who offers them irresistibly good price). Viewed in such perspective, the common property can be loosely considered as akin to a property subject to restriction-in-interest such as the requirement of a statutory authority's

consent prior to any sale or transfer. Learned counsel for the appellant here has cited the case of *Perbadanan Kemajuan Pertanian Selangor v. JW Properties Sdn Bhd* [2017] 8 CLJ 392 at 413 to 414 where the Federal Court held that the fact that the land is subject to a restriction-in-interest which requires the prior consent of the State Authority before its transfer does not change the legal position that a fair compensation ought to be made for compulsory acquisition of such land or an interest in such land. Subparagraph 1(2C) of First Schedule to the Land Acquisition Act 1960 also recognises that a property devoted for a non-marketable purpose has a substantial value for purposes of compensation in acquisition. Of course, it goes without saying that the degree of transferability or potential transferability of the common property in a strata development is not as high as that of a property which is merely subject to a restriction-in-interest in the form of prerequisite State Authority's consent. This difference in the degree of transferability or potential transferability at a certain point of time has an effect on the amount of the fair market value of the property in question but it does not render the property to be without any market value for the purposes of art. 13 of our Federal Constitution or for the purposes of Land Acquisition Act. It is therefore the considered view of this court that the Land Administrator's said ancillary argument is not sustainable in law. In the considered view of this court, the temporary non-transferability in the near future will have a diminutive effect on the quantum of the reasonable compensation but does not affect the entitlement in principle to an amount of reasonable compensation.

[23] The Land Administrator has also raised another ancillary argument to the effect that the value of the common property has been included in the compensations paid by the acquisition authority to the parcel owners for their respective parcel units in the strata development. As rightly submitted by the appellant here, there is no cogent proof of this factual assertion of the Land Administrator and according to the settled legal principle that he who alleges must prove, the factual basis of this ancillary argument has not been established and therefore the ancillary argument ought to be rejected by this court. Further or alternatively, even if this court were to assume that the Land Administrator were factually correct in saying that the value of the common property has been included in the compensations paid by the acquisition authority to the parcel owners for their respective parcel units in the strata development, it would not absolve the acquisition authority from its legal responsibility to pay reasonable compensation for the common property to its rightful proprietor, the management corporation. If a person is under a legal obligation to pay a sum of money to party A but he mistakenly pays the sum of money to party B erroneously thinking that party B has the right to receive the payment, the payer is not absolved from his legal obligation to pay party A, the rightful party to receive the payment under the law. This legal principle is so basic and fundamental to the whole

system of finance and business in our society that any deviation therefrom would probably lead to severe damage and prejudice to the financial and trade system. To me, it is not necessary to cite any case authority for such basic and foundation point. If any case authority be desired to give some jurisprudential flavour to this position, it can be drawn by analogy to the clear law that if a party makes a mistake as to his legal position, the court is not bound by it (*Guan Soon Tin Mining Co v. Ampang Estate Ltd* [1972] 1 LNS 39; [1973] 1 MLJ 25 at p. 29, *Rethnasamy v. Teoh Ngoo Mooi & Anor* [1982] 1 LNS 82; [1983] 1 MLJ 344 at p. 347).

[24] Not giving up, the Land Administrator also relies on a third ancillary argument that in our present case, the management corporation did not collect parking fees for the majority of the car parking bays within the strata development. Under our laws, there is no statutory prohibition against a management corporation's levy and collection of parking fees in the car parking bays which form part of the common property in the strata development. The Land Administrator's third ancillary argument is also contrary to decided authority on common property. In Singapore case of *Cold Storage Singapore [1983] Pte Ltd v. The Management Corp Of Chancery Court & Ors* [1992] 1 CLJ 537; [1992] 4 CLJ (Rep) 272 at 274, the Singapore Court of Appeal affirmed Chan Sek Keong J's decision which held that the plaintiff as a tenant of a parcel had no right to claim for free usage of the parking bays by his customers as it is the management who bears the costs of maintenance of the carpark bays. This is corroborative of the legal position that the value of carpark bays are not reflected in the value of the strata parcels of the parcel owners. Although the management corporations in some strata developments may not be collecting parking fees for the car parking bays in the common property at certain points of time, there is nothing in our laws to prohibit the management corporation, backed by a majority vote of its members, from altering its decision by charging parking fees for the car parking bays. Apart from that, there are also strata developments where management corporations collect parking fees for car parking bays at the common property. In the considered view of this court, the law does not countenance a valid distinction to be made on account of the internal commercial decisions of the management corporations as to whether or not to collect parking fees when it comes to the constitutional rights to receive reasonable compensation for compulsory acquisition of properties. What the Land Administrator's third ancillary argument says is to the effect that in valuation of the fair market value of properties, the market value of an unoccupied house should by the same reckoning be much or significantly lower than the market value of an occupied house, all other things being equal. Or, another way of asserting the Land Administrator's third ancillary argument is to the effect that if an empty land is permitted by the proprietor to be used by others for parking cars free of charge, then such empty land would be liable to be

compulsorily acquired without having to be paid any monetary compensation. This, according to our understanding, is not correct. In the premises, this court finds the Land Administrator's third ancillary argument to be unsustainable and invalid.

Summary And Analysis Of The Assessors' Opinions

[25] The initial opinion of the Government assessor was that after having paid the compensation to the parcel owners of the strata parcels in a stratified development, no compensation whatsoever ought to be paid for the compulsory acquisition of the common property in the stratified development to the management corporation, the proprietor of the common property. After having read the parties' respective written submissions and this court's provisional view, the Government assessor still maintained his opinion that no compensation whatsoever should be paid for the common property. In the opinion of the Government assessor, reasons given for his opinion are (a) the compensations to the parcel owners for the acquisition of the strata parcels have included the value of the common property and any compensation payable to the management corporation for the acquisition of the common property would be double counting; (b) the management corporation is not an entity established for the purpose of business operations or for profit and any income derived from the common property cannot be regarded as earning to be enjoyed by enterprise or investor; and (c) the collection of incomes from the common property have to be deposited in a maintenance account pursuant to statute and be used for maintenance of the building, and therefore cannot be regarded as profit to be enjoyed by enterprise or investor.

[26] The initial opinion of the private assessor was that after having paid the compensation to the parcel owners of the strata parcels in a stratified development, no compensation whatsoever ought to be paid for the compulsory acquisition of the common property in the stratified development to the management corporation, the proprietor of the common property. After having read the parties' respective written submissions and this court's provisional view, the private assessor has revised his opinion to the effect that on the facts and in the circumstances of the present case, although no compensation whatsoever should be paid for part of the common property in the form of vacant land and open space, some compensation ought to be paid for the common property in the form of basement car parking bays and open-air car parking bays. The private assessor's reasons regarding common property in the form of the vacant land are that the vacant land has been used as access road and working space to service the stratified development and any compensation therefor over and in addition to the compensations paid to the parcel owners for any re-development potential in the far distant future would be double counting. As regards the common property in the form of car parking bays, the private valuer opines that 17

of the bays have been earning incomes for the management corporation and the balance bays have the potential of earning incomes in the near future if the management corporation so decides to levy parking fees, and therefore valuation by "investment method" can be used to assess the reasonable compensation for the car parking bays. In making such opinion, the private assessor has also referred to the *Malaysian Valuation Standards*, 6th edn, 2019 which *inter alia* stipulate that:

(1) "The Market Value will reflect its highest and best use. The highest and best use is the use of an asset that maximises its potential and that is physically possible, legally permissible and financially feasible. The highest and best use may be for continuation of an asset's existing use or for some alternative use. This use is determined by the use a market participant would have in mind for the asset when formulating the price that he would be willing to bid."

(2) Market Value is defined for the purpose of these Standards, in accordance with the International Valuation Standards, as follows:

(3) Market Value is the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's-length transaction after proper marketing where the parties had each acted knowledgeably prudently and without compulsion.

(4) The definition of market value shall be applied in accordance with the following conceptual framework:

(a) "The estimated amount" refers to a price expressed in terms of money payable for the asset in an arm's length market transaction. Market value is the most probable price reasonably obtainable in the market on the valuation date in keeping with the market value definition. It is the best price reasonably obtainable by the seller and the most advantageous price reasonably obtainable by the buyer. This estimate specifically excludes an estimated price inflated or deflated by special terms or circumstances such as a typical financing, sale and lease back arrangements, special considerations or concessions granted by anyone associated with the sale, or any element of value available only to a specific owner or purchaser, (defined in MVS 5 (Valuation Bases other than Market Value).

(b) "An asset or liability should exchange" refers to the fact that the value of an asset or liability is an estimated amount rather than a predetermined amount or actual sale price. It is the price in a transaction that meets all the elements of the Market Value definition at the valuation date.

(c) "On the valuation date" requires that the estimated Market Value is time-specific as of a given date. Because markets and market conditions may change, the estimated value may be

incorrect or inappropriate at another time. The valuation amount will reflect the actual market state and circumstances as at the valuation date, not those at any other date.

(d) "Between a willing buyer" refers to one who is motivated, but not compelled to buy. This buyer is neither over-eager nor determined to buy at any price. This buyer is also one who purchases in accordance with the realities of the current market and with current market expectations, rather than in relation to an imaginary or hypothetical market that cannot be demonstrated or anticipated to exist. The assumed buyer would not pay a higher price than the market requires. The present owner is included among those who constitute "the market".

(e) "And a willing seller" is neither an over-eager nor a forced seller, prepared to sell at any price, nor one prepared to hold out for a price not considered reasonable in the current market. The willing seller is motivated to sell the property at market terms for the best price attainable in the (open) market after proper marketing, whatever that price may be. The factual circumstances of the actual owner are not a part of this consideration because the "willing seller" is a hypothetical owner.

(f) "In an arm's-length transaction" is one between parties who do not have a particular or special relationship, eg, parent and subsidiary companies or landlord and tenant), that may make the price level uncharacteristic of the market or inflated. The Market Value transaction is presumed to be between unrelated parties, each acting independently.

(g) "After proper marketing" means that the asset has been exposed to the market in the most appropriate manner to effect its disposal at the best price reasonably obtainable in accordance with the Market Value definition. The method of sale is deemed to be the most appropriate to obtain the best price in the market to which the seller has access. The length of exposure time is not a fixed period but will vary according to the type of asset and market conditions. The only criterion is that there must have been sufficient time to allow the asset to be brought to the attention of adequate number of market participants. The exposure period occurs prior to the valuation date.

(h) "Where the parties had each acted knowledgeably, prudently" presumes that both the willing buyer and the willing seller are reasonably informed about the nature and characteristics of the asset, its actual and potential uses, and the state of the market as of the valuation date. Each is further presumed to use that knowledge prudently to seek the price that is most favourable for their respective positions in the transaction. Prudence is assessed by referring to the state of the market at the valuation

A

date, not with benefit of hindsight at some later date. For example, it is not necessarily imprudent for a seller to sell an asset in a market with falling prices at a price that is lower than previous market levels. In such cases, as is true for other exchanges in markets with changing prices, the prudent buyer or seller will act in accordance with the best market information available at the time.

B

(i) "And without compulsion" establishes that each party is motivated to undertake the transaction, but neither is forced or unduly coerced to complete it.

C

(5) Properties may be valued on bases or premise of value other than Market Value, or may exchange hands at prices, which do not reflect Market Value as defined. Such alternative bases may either be reflections of a non-market perspective of utility, or of unusual and non-market conditions. Properties may be valued on bases or premise of value other than Market Value, or may exchange hands at prices, which do not reflect Market Value as defined. Such alternative bases may either be reflections of a non-market perspective of utility, or of unusual and non-market conditions.

D

(6) The majority of professional valuations, particularly valuations referred to in MVS 3 (Purposes of Valuation), involve Market Value. There are however circumstances that call for bases or premise of value other than Market Value. It is therefore essential that both the Valuer and the users of these valuations clearly understand the distinction between Market Value and non-Market Value based valuations, and the effects (if any) which the differences these concepts may have upon the applicability of the valuation.

E

F

(7) Properties may be valued on bases or premise of value other than Market Value, or may exchange hands at prices, which do not reflect Market Value as defined. Such alternative bases may either be reflections of a non-market perspective of utility, or of unusual and non-market conditions. Bases or premises of value other than Market Value include Investment Value and Intrinsic Value.

G

(8) Investment Value:

This subjective concept relates a specific asset to a specific investor, group of investors, or entity with identifiable investment objectives and/or criteria. The Investment Value, or Worth, of an asset may be higher or lower than the Market Value of the asset. The term Investment Value, or Worth, should not be confused with the Market Value of an investment asset. However, Market Value may reflect a number of individual assessments of the Investment Value, or Worth, of the particular asset. Investment Value or Worth is associated with Special Value.

H

I

(9) Intrinsic Value:

Intrinsic Value is also frequently called Fundamental Value. It is ordinarily calculated by summing up the discounted future income generated by the asset to obtain the present value. It is worthy to note that this term may have different meanings for different assets.

[27] From the opinion of the private assessor and the *Malaysian Standard of Valuation*, 6th edn, 2019, it appears that the valuation profession recognises the use of methods of valuation other than the market value in the valuation of the properties in certain exceptional situations and/or for different purposes of valuations. It should be noted that the principles and method of valuation for determining the market value of land and properties for compulsory land acquisition purposes shall be as provided for in the Land Acquisition Act 1960, and any valuation method used by the valuers for other purposes of valuation which is contrary to or inconsistent with the provisions of the Land Acquisition Act 1960 cannot be used for the valuation of market value of lands and properties for the purpose of the compulsory acquisition under the Land Acquisition Act 1960.

[28] Under the Land Acquisition Act 1960 the principles, factors and method of valuation of lands and properties for the purpose of compulsory acquisition are stipulated in the Land Acquisition Act 1960 including the First Schedule thereto. The First Schedule to the Land Acquisition Act 1960 provides *inter alia* as follows:

Market value

1. (1) For the purposes of this Act the term "market value" where applied to any scheduled land shall mean the market value of such land:

(a) at the date of publication in the *Gazette* of the notification under s. 4, provided that such notification shall within twelve months from the date thereof be followed by a declaration under s. 8 in respect of all or some part of the land in the locality specified; or

(b) in other cases, at the date of the publication in the *Gazette* of the declaration made under s. 8.

(1A) In assessing the market value of any scheduled land, the valuer may use any suitable method of valuation to arrive at the market value provided that regard may be had to the prices paid for the recent sales of lands with similar characteristics as the scheduled land which are situated within the vicinity of the scheduled land and with particular consideration being given to the last transaction on the scheduled land within two years from the date with reference to which the scheduled land is to be assessed under subparagraph (1).

...

(2C) In assessing the market value of any scheduled land which but for the acquisition would continue to be devoted to a purpose of such nature that there is no general demand or market for that purpose, the

A assessment shall be made on the basis of the reasonable cost to the proprietor of the scheduled land of using or purchasing other land and devoting it to the same purpose to which the scheduled land is devoted, if the Land Administrator is satisfied that this is *bona fide* intended by the proprietor of the scheduled land.

B **[29]** Sale comparable method is the best and most preferred method of valuation of lands and properties where there are available sale comparable that can be used, and the law does not prohibit the use of any method of valuation in exceptional situations where there is no available sale comparable to be used: see sub-para. 1(1A) of the First Schedule to the 1960 Act. In respect of lands and properties which are "devoted to a purpose of such nature that there is no general demand or market for that purpose, the assessment shall be made on the basis of the reasonable cost to the proprietor of the scheduled land of using or purchasing other land and devoting it to the same purpose to which the scheduled land is devoted, if the Land Administrator is satisfied that this is *bona fide* intended by the proprietor of the scheduled land": sub-para. 1(2C) of the First Schedule to the 1960 Act. The general provision in sub-para. 1(2C) of the First Schedule to the 1960 Act is wide enough to include places of worship (such as mosques, suraus, temples, churches, burial grounds, etc), buildings or lands devoted as public trust or for charitable purposes (eg, trust properties of associations or guilds, memorial grounds or monuments, etc), common property in a stratified development devoted for the common use or enjoyment of the parcel owners or occupiers or for the management corporation's collection of incomes, public park area or open space held by local authorities, etc.

Answer To The Question Of Law

[30] In conclusion, the answer to the question of law is that after having compensated the parcel owners of strata units for the market values of their respective strata units, the acquisition authority cannot acquire the common property in the same strata development in the same process without paying any value to the management corporation of the strata development irrespective of the facts and circumstances of the strata development.

[31] Under the laws, after having compensated the parcel owners of strata units for the market values of their respective strata units, the acquisition authority still has to pay a reasonable compensation to the management corporation of the strata development for having acquired the common property in the same strata development in the same acquisition process, provided that the valuation of such compensation amount shall be done in accordance with the provisions of sub-para. 1(2C) of the First Schedule to the Land Acquisition Act 1960, namely, the basis of the reasonable cost to the proprietor of the scheduled land of using or purchasing other land and devoting it to the same purpose to which the scheduled land is devoted.

[32] In the context of the present land reference where the common property in the stratified development was devoted for the common use or enjoyment of the parcel owners or occupiers and/or for the management corporation's collection of incomes or potential of income collections, this court agrees with the private assessor's opinion that no additional compensation should be made to the management corporation for the vacant land or open space which form the common property but some reasonable compensation ought to be paid to the management corporation for the car parking bays. The reasons for the decision on this point are:

(i) The vacant land and open space which form parts of the common property are devoted solely and exclusively to serve the use and enjoyment of parcel owners and occupiers of the strata parcels, and apart from such purposes, there is no other conceivable purpose and also no income to be derived from them. As such, after having compensated the parcel owners for the acquisition of strata parcels which compensation include the parcel owners' rights of use and enjoyment of the vacant land and open space within the stratified development, it would be double counting for the management corporation to be compensated again for the vacant land and open space within the stratified development.

(ii) 17 numbers of the car parking bays have been earning incomes for the management corporation before and at the time of the compulsory acquisition. If not for such acquisition, the management corporation would have continued to earn an income from these 17 car parking bays. As regards the balance 105 car parking bays which were for the time being allowed by the management corporation to be used by the parcel owners and the occupiers free of charge, there is no legal prohibition against the management corporation from deciding to impose parking charges at some future time and thereby earning incomes from them. This potential income-earning capacity or opportunity has been eliminated by the compulsory acquisition. Compared with the 17 numbers of income-earning bays, the current value per unit of these non-income earning balance bays would be much less because it is the potential capacity or opportunity (not the ongoing income earning) which has been eliminated.

Value Of The Common Property

[33] In our present case, the Government valuer opined that the appellant was not entitled to any compensation for the common property and therefore he did not make any valuation for the common property or express any opinion on the amount of compensation for the common property.

[34] The private valuer Drago Two Property Consultancy assessed and valued the common property as follows:

A 8.0 DESCRIPTION OF SUBJECT DEVELOPMENT

Pusat Komersil Ara Ampang is a small commercial 3 storey development built approximately 12 years ago. It comprises 10 units of retail shops at ground level with shop and office accommodation on the upper 2 floors. There is covered car parking at basement level and some on-street parking.

B The subject development has been subdivided into 40 individual parcels and has been sold with individual strata titles. Floor plans of the basement, ground first and second floor together with photographs are attached in Appendix E.

C From the plans and title particulars provided we have been able to compute the following:

Site Area :	3,895 sq. metres (41,926 sq. feet)
PKAA (Building Floor Plate) :	2,080 sq. metres (22,389 sq. feet)
Surface Car Park/Service Rd :	1,815 sq. metres (19,537 sq. feet)

D 15.0 MARKET VALUATION OF COMMON PROPERTY

A. Land Surrounding PKAA

E From the computations summarised in s. 8 above, the area taken up by the service road and surface car parking amounts to 19,537 square feet This equates to approximately 47% of the site area. In our opinion there is under-utilisation of the site and, with amendments to the site layout, greater efficiency can be achieved.

F Whilst it is accepted that ingress and egress is an essential component of a building development **we are of the opinion that it is undeniable that there is an intrinsic redevelopment market value attributable to the land**. The market value however is diminished and in this regard we are of the opinion that it is reasonable to adjust downwards by 80%.

The market value of the land acquired is computed as follows:

G

Market Value of land	RM 760 per sq. ft
80% Downward Adjustment	RM 608 per sq. ft
Adjusted Market Value	RM 152 per sq. ft
19,537 sq. ft @RM 152 psf =	RM 2,969,624.00
Say	RM 2,970,000.00

H B. Basement Car Parking

We attach a copy of the Rental Agreement of parking spaces to Eon Auto Mart Ampang and Gemilang Travel and Tours Sdn Bhd in

Appendix G.

The pertinent details are summarised as follows:

I Total Parking Bays - 122 spaces

Rental Agreements:

Eon Auto Mart Ampang - 15 spaces RM1,500.00 per month

Gemilang Travel & Tours S/B - 2 spaces RM 340.00 per month

From the two Rental Agreements it is noted the rental received varies from RM100 and RM170 per month per parking space. To arrive at the Capital Value of the basement car parking spaces we have adopted the Income Method of Valuation as follows:

Valuation of Car Parking spaces

Adopt Monthly Income -	RM 150 per parking space
Gross Annual Income	RM 1,800 per parking space
Less Outgoings @ 10%	180
Net Annual Income	RM 1,620 per parking space
Capitalise YP perp (a). 10%	x 10
Value of each parking space	RM 16,200
Number of parking spaces	x 122
Total Value of Parking Spaces	RM 1,976,400.00

Note : From our enquiries and survey the going rate of car parking spaces is between RM15,000 to RM25,000 per parking space depending on the location and other factors.

16.0 TOTAL COMPENSATION CLAIMED

A. Market Value of Common Property	RM 2,970,000.00
B. Market Value of Basement car parking	RM 1,976,400.00
C. Property Management Services	RM 70,300.00
D. Valuer Attending Enquiry & Meeting	RM 300.00
TOTAL COMPENSATION CLAIMED	RM 5,028,933.00

[35] In analysis and finding of this court, depending on the facts and circumstances of each case, there are two possible components to the market value of common property in a strata development:

(i) lease or rental income, or the potential of such income; and

(ii) re-development potential in the future in the event of *en block* sale or, upon total destruction of the strata building, the cancellation of the subdivision.

[36] The corridors, verandas, lift lobbies, staircases and walkways which formed parts of the common property within the stratified building structure but are outside the strata parcels of the parcel owners are so integrated with the building structure and so closely connected with the use and enjoyment of the strata parcels that no separate or additional value ought to be paid to the management corporation after the parcel owners have been compensated for the compulsory acquisition of their strata parcels. There is also no

possibility of the management corporation's potential for collection or earning any rental or income from these types of common property. As such, no compensation value should be given for these types of common property.

[37] When a developer decides to sell the parcels in a development plus the car parking bays as accessory parcels, it is common feature of the sale pricing that separate and different prices are allocated to a parcel (eg, office floor area) and to its accessory parcel (car parking bay). Although the basement carpark is structurally integrated with the building structure of the stratified building, the basement car parking bays owned by the management corporation have the potential of earning rentals and incomes for the management corporation if the management corporation decides to levy parking fees. As such, only the component (a) (lease or rental income or potential of such income) is of relevant consideration in the subject property here. Taking into consideration that the basement parking bays were not earning income for the management corporation at the time of the acquisition, only the potential of earning such income can be taken into consideration in assessing the replacement cost of the parking bays. We are of the considered view that the quantum of value assessed by the private valuer is excessive.

[38] On the valuation of the fair market value of a property, this court has recognised that there is no hard and fast rule in such valuation, and a significant element of judgment is involved. As was held previously, "in the final analysis, the appropriate principles to be applied must depend on the special facts of each particular case and be applied according to sound practical common sense, rather than by some artificial rule of thumb". (*Alagappa Chettiar v. Collector Of Land Revenue, Kuala Lumpur* [1968] 1 LNS 4; [1968] 1 MLJ 243).

[39] In his revised opinion, the private assessor has assessed the value of common property in the form of car parking bays as follows:

Basement Carpark	
Monthly car park	RM150 per parking space (15 bays)
Gross Annual Income	RM1,800 per parking space
Less : Outgoing @ 20%	360
Net Annual Income	RM1,440 per parking space
Capitalise @ 10%	x 10
Market Value	RM14,400 per parking space
Number of parking	122 bays
Total parking value	RM1,756,800
Less : Occupancy & Contingency	- 50%
Total Market Value	RM878,000

[40] In this case, there were 122 car parking bays in the strata development. Out of the total of 122 car parking bays, 15 bays were leased to Eon Auto Mart Ampang for RM100 per bay per month, while two other bays were rented to Gemilang Travel & Tours Sdn Bhd at RM340 per bay per month. The other bays were allowed to be used by the occupiers, tenants and visitors free of charge. In the opinions of the learned assessors and in the judgment of this court, the fair and reasonable value to compensate the management corporation for loss of incomes and/or potential incomes from the basement parking fees should be as follows:

(i) in respect of the 15 bays with incomes, this court assesses the replacement cost (pursuant to sub-para. 1(2B) of the First Schedule) by reference to the current value of the future value based on an annual yield of 5% per annum:

Monthly car park	RM150 per parking space (15 bays)
Gross Annual Income	RM1,800 per parking space
Less : Outgoings @ 30%	540
Net Annual Income	RM1,260 per parking space
• At annual yield of 5%	
Market Value (nominal)	RM25,200 per parking space
Number of parking	15 bays
Subtotal value of 15 bays	RM378,000
Less : Occupancy & Contingency	- 30%
Net Market Value (replacement basis)	RM264,600
Loss of Potential Monthly Income	RM21 per parking space
Net Potential Loss of Annual Income	RM252 per parking space
At annual yield of 5%	
Market Value (nominal)	RM5,040 per parking space
Number of parking bays	105 bays
Subtotal value of 105 bays	RM529,200
Less: Occupancy & Contingency	- 30%
Net Market Value (replacement basis)	RM370,440.

The total replacement costs of all 122 car pay bays on yield basis are RM264,600 + RM50,000 + RM370,440 = RM685,040.

[41] As for the vacant land in the strata development including the open air parking bays, both the components (i) and (ii) stated in para. 32 above can be relevant, depending on the facts and circumstances of each case. In our considered view, the factors which affect the value of the vacant land comprised in the common properties include:

(i) its location and the surrounding properties;

(ii) whether any current collection of rental incomes;

(iii) the length of time before the future re-development potential can materialise;

(iv) the popularity of the strata development as a commercial area; and

(v) relative area of vacant land when compared with the building platform, ie, the density of the strata development.

[42] In our considered opinion, a stratified building of less than 30 years of age is very unlikely to have a significant re-development value at current time in light of the fact that the destruction of the building by lapse of time would most probably be about 50 or more years in the distant future and it is very unlikely for unanimous consent of all parcel owners to be obtained for an early cancellation of the strata register and the re-sale of the entire land and building. In light of the fact that the re-development potential of this relatively new stratified building could only materialise at such a very distant future, component (b) (ie, re-development potential of the open space land) for this subject land is negligible or *de minimis*. This is very unlikely a very old and dilapidated stratified building, say of age of 80 years, where the strata parcels are not of much market value due to their inhabitable condition but the land and its open space would have substantial value due to its re-development potential which can be materialised soon after its sale. On the facts and circumstances of this subject land, we assess that there is no value to be given to component (b) (ie, re-development potential) for this subject land with a stratified building of less than 30 years old over and above the compensation awarded to the parcel owners and for the loss of potential incomes from the carpark bays. In our considered opinion, the private valuer's method of using the current market value of the land in the same locality and discounting it by a factor for such relatively new development would most probably result in duplication or double counting in the valuation of the strata parcels, and therefore it is not appropriate for the subject land in our recent case. In our considered opinion, the private valuer's method of using the current market value of the land in the same locality and discounting it by a factor for such relatively new development would most probably result in duplication or double counting in the valuation of the strata parcels, and therefore it is not appropriate for the subject land in our resent case.

Conclusion

[43] In conclusion, this court holds that in respect of the car parking bays held by the management corporation as parts of the common property in this stratified development, the management corporation is entitled to be paid a reasonable compensation for the compulsory acquisition of common property in this stratified development.

[44] Accordingly, this court hold that the Land Administrator's award for the management corporation (the applicant herein) shall be increased by an amount of RM685,040. There should be interest thereon at 5% per annum from the date of Borang K until the date of full realisation.

[45] This court agrees with the assessors that the other items of the award by the Land Administrator on management services and valuation fee should remain.

[46] The respondent shall pay the applicant the costs of this land reference.